

(1) The issue raise on appeal, i.e. whether claimant's injury arose out of and in the course of his employment, is one listed in K.S.A. 44-534a as an issue which the Appeals Board does have jurisdiction to review on appeals from preliminary orders.

(2) After review of the record and consideration of the arguments made by counsel, the Appeals Board finds that claimant has not proven by a preponderance of the credible evidence that his neck and upper back injury arose out of and in the course of his employment. The Appeals Board does, therefore, reverse the decision by Administrative Law Judge James R. Ward.

Claimant has alleged and testified that he injured his neck, upper back, low back and sustained hernias by accident on September 9, 1992, when opening a garage door. Respondent admits the injuries to the low back and the hernias, but denies claimant injured his upper back and neck.

Respondent authorized treatment by Dr. A. K. Tayiem of Atchison, Kansas. In addition to the treatment for the bilateral inguinal hernia, Dr. Tayiem's records show complaints and treatment for low back injury and sciatica. Physical therapy was ordered. His records admitted into evidence contain no mention of upper back or neck complaints nor treatment for such conditions. The medical records from Atchison Hospital include the physical therapy progress notes. Again, these show complaints of low back, left hip and leg pain with treatment for lumbar sprain. The physical therapy records contain no complaints nor treatment for the upper back or neck.

Respondent referred claimant for an independent medical examination by Dr. Michael Schmidt on August 26, 1993. His physical examination revealed a limited cervical range of motion. X-rays showed severe degenerative disc disease at C5-6 with severe foraminal encroachment at that level on the left and to a lesser extent on the right. There was also mild degenerative disc disease at C4-5 and disc space narrowing from T-12 to L-3 with some wedging of L2. Spondylolysis or spondylolisthesis was noted. Likewise, spurring was noted at L-3 through L-5. Dr. Schmidt's impression was intermittent episodes of cervical spine pain with severe muscle spasms secondary to cervical spondylolysis at C5-6 level and foraminal encroachment. Also, intermittent lumbar spine pain secondary to degenerative disc disease without evidence of nerve root impingement. However, Dr. Schmidt did not find claimant's neck and upper back conditions to be work related.

Claimant went on his own to Dr. William Bailey, an orthopedic surgeon, on February 9, 1993. He complained to Dr. Bailey of neck, upper back and low back symptoms including pain down both arms. However, Dr. Bailey's office notes indicate a history of cervical spine and scapular pain for the past two weeks with no injury. Dr. Bailey has not given an opinion concerning the relationship between the September 9, 1992, accident and the claimant's neck problems.

Claimant reported his injury to Debbie Miller, the secretary for the respondent. Her affidavit was admitted into evidence. She admits claimant reported an injury in September 1992 to his low back and a hernia, but she denies he made any report of injury to his neck or any other part of his body.

From these facts and from the evidence presented in the record as a whole, the Appeals Board concludes that claimant has not met his burden and his request for medical treatment for the neck and upper back conditions is, therefore, denied.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the decision of Administrative Law Judge James R. Ward, in his Preliminary Hearing Order dated April 27, 1994, is hereby reversed.

IT IS SO ORDERED.

Dated this ____ day of September, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Eugene C. Riling, PO Box B, Lawrence, KS 66044
Ronald J. Laskowski, PO Box 949, Topeka, KS 66601
James R. Ward, Administrative Law Judge
George Gomez, Director